Supreme Court, U.S.
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No. 07-_____

IN THE

Supreme Court of the United States

JOSEPH J. MANN, an adjudged mentally incapacitated adult, by and through his daughter, BEVERLY MANN; BEVERLY MANN, individually,

Petitioners,

v.

BRIAN D. BOATRIGHT, individually and in his capacity as a Jefferson County, Colorado First Judicial District Judge; *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Tenth Circuit's interpretation of the *Rooker-Feldman* doctrine presents three questions regarding the doctrine's nature and breadth and whether *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., Marshall v. Marshall* and *Whitman v. Dept. of Transportation*, altered the doctrine in any significant manner at all:

a) Does the Tenth Circuit's stated interpretation of the *Rooker-Feldman* doctrine and of *Exxon Mobil Corp.* effectively conflict with this Court's holdings in *Whitman v. Dept. of Transportation*, and *Marshall v. Marshall*, and conflict directly with the provision in the Constitution's Art. III, section 2, that "[the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"?

b) Does the Tenth Circuit's interpretation of *Exxon Mobil* conflict directly with that opinion's express holding that 28 U.S.C. § 1257 does not "stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court [and that if] a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion"?

c) Does the Tenth Circuit's interpretation of the *Rooker-Feldman* doctrine conflict with the specific language of 42 U.S.C. § 1983 as amended that provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity", a declaratory decree may be issued and then injunctive relief may follow if that declaratory decree is violated?

2. Does the authority that the Tenth Circuit claims for itself to spontaneously remove from the caption of an appeal the name of an adjudicated-mentally-incompetent adult plaintiff-appellant and to pronounce him not a party to the appeal and (presumably) not a party to the litigation at all, upon the stated basis that his *ex rel.* (in this instance his adult daughter) filed the lawsuit *pro se*, effectively conflict with this Court's recent holding in *Winkelman v. Parma City School District*, and does it violate the adjudicated-mentally-incompetent adult's right of access to the courts under the First Amendment's petition clause, his right to due process and equal protection of the law under the Fifth Amendment, and his right of access to federal court under Fed. R. Civ. P. 17(a), (b) and (c), where, as here, he has no other avenue to access to court, in this instance in order to seek emergency equitable relief against a state?

3. Does the Tenth Circuit's holding that the daughter's *pro se* status rendered her lacking in standing to bring a lawsuit that sought (among other things) on her father's behalf emergency equitable relief effectively conflict with this Court's subsequent opinion in *Winkelman*, especially in light of the Tenth Circuit's main stated basis that *pro se* plaintiffs are, according to the court, more likely than counseled plaintiffs to bring abusive lawsuits? Does what the Tenth Circuit admits (notwithstanding its use of the term "standing") is simply its own policy determination reach beyond the common law authority of federal courts of appeals and violate the constitutional doctrine of separation of powers?

4. Does this Court's recent holding in *Panetti v. Quarterman*, 127 S. Ct. 2842 (Jun. 28, 2007), which clarifies the minimum requirements of a mental competency hearing in the context of a state criminal case and which also holds that those minimum requirements cannot be abridged whether by state statute, procedural rule or local practice, apply as well to respondents in probate-court guardianship and conservatorship matters? Irrespective of the specific applicability of *Panetti*, is such a respondent entitled under the Fourteenth Amendment's

due process, equal protection and privileges and immunities clauses to such basic protections as the right to attend his own competency hearing if he is physically able; the right to contest the guardianship and conservatorship petitions; the right to counsel (including, as here, the right to retain private counsel if he wishes and can afford to do so); the right to seek revocation or revision of court orders that stripped him (in this instance, in court-compelled *absentia* and without the presentation of medical testimony or medical records) of his legal and personal autonomy and of even his most basic freedoms; the right to learn of those court orders, their breadth and effect, and how they came about; and an avenue by which to appeal from them?

5. Do basic procedural due process guarantees such as notice, stated allegations of substantive grounds, meaningful opportunity to respond (including via access to relevant witnesses, medical records and financial records of the respondent to guardianship and conservatorship petitions, and the right to cross-examination) repose in an adult child of the respondent to petitions for guardianship and conservatorship before a court can force the estrangement of the respondent and his child and can order the nearly complete sequestration of the respondent (thus forcing his estrangement not only from the child but from others as well), the denial to him of the fact of the court proceedings and the court orders and their effect and how they came about, and the denial to him of access to private counsel and to the court itself? Apart from whether or not the respondent and to the adult child were accorded sufficient procedural due process, do such court orders violate the substantive due process rights of the respondent and, separately, of the adult child, as defined by this Court in *Daniels v. Williams* and by analogy in *Lawrence v. Texas*?

6. Does the authority that the Court of Appeals for the Tenth Circuit claims for itself to disregard the express language of Fed. R. Civ. P. 15(a) that provides that "[a] party may amend the party's pleading once as a matter of course at

any time before a responsive pleading is served," and to invite federal district courts to do so as well and to *sua sponte* dismiss, perhaps without leave to amend, any initial complaint that the court believes does not comply with Fed. R. Civ. P. 8(a), reach beyond the common law authority of federal courts of appeals, violate the constitutional doctrine of separation of powers, and conflict with this Court's holding in *Jones v. Bock* and the Fifth Amendment's due process clause?

7. Do federal courts of appeals have the authority, as the Court of Appeals for the Tenth Circuit claimed expressly in an order issued by a motions panel and then affirmed by the merits panel in this case, to decide appeals upon *sua sponte* grounds without first providing notice and opportunity to address the issue, or instead must courts of appeals comply with the standard due process requirements of notice and opportunity to address the issue as a prerequisite to *sue sponte* decisionmaking, as this Court suggests in *Day v. McDonough*? Is a court of appeals entitled within the confines of due process to impose a monetary sanction (in this case, a fine of $500 payable to the court itself) for the filing of a motion for reconsideration of such a *sua sponte* ruling that pronounced an appellant not a party to the appeal and that stripped his name from the very caption of the appeal, when the motion for reconsideration was the sanctioned party's only opportunity to address the *sua sponte* issue that determined the outcome of substantial parts of the litigation?

PARTIES TO THE PROCEEDING

The Petitioners are JOSEPH MANN and BEVERLY MANN. The Respondents are the initial defendants who participated in the appeal in the Tenth Circuit. They are BRIAN D. BOATRIGHT, individually and in his capacity as a Jefferson County, Colorado First Judicial District Judge; JAMES D. ZIMMERMAN, individually and in his capacity as a Jefferson County, Colorado First Judicial District Judge; FREDERIC B. RODGERS, a Gilpin County, Colorado, County Judge and (by special designation of Colorado First Judicial District Chief Judge R. Brooke Jackson) Jefferson County, Colorado, Probate Judge, in his capacity as Jefferson County, Colorado First Judicial District Probate Judge; R. BROOKE JACKSON, in his capacity as Chief Judge of the First Judicial District, State of Colorado; THE FIRST JUDICIAL DISTRICT, STATE OF COLORADO; THE STATE OF COLORADO; TINA L. OLSEN, in her capacity as a Jefferson County, Colorado, County Judge; THOMAS E. VANCE, in his capacity as a Jefferson County, Colorado, County Judge; WILLIAM KILPATRICK, individually and in his capacity as City of Golden, Colorado Police Chief; MATT JURISCHK, individually and in his capacity as a City of Golden, Colorado Police Officer; THE CITY OF GOLDEN, Colorado, a municipal corporation; JOHN S. GLEASON, individually and in his capacity as Colorado Supreme Court Attorney Regulation Counsel; LOUISE CULBERSON-SMITH, individually and in her capacity as a Colorado Supreme Court Assistant Attorney Regulation Counsel; THE COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL; CARLA MARTIN, individually and in her former capacity as general manager of Golden Pond Senior Living, LLC; GOLDEN POND SENIOR LIVING, LLC, a Colorado corporation; and HENRY MELTON, in his capacity as Executive Director of Golden Pond Senior Living. Additional defendants were named in the Complaint but did not file appearances and briefs in the appeal.

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In the Matter of Joseph Mann,
No. 04-p-1176 (Jefferson Cty., Colo. Dist. Ct.)

PROVISIONS OF THE UNITED STATES CONSTITUTION

Article I, Section 9

Article III, Section 1

Article III, Section II

First Amendment

Fourth Amendment

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FEDERAL STATUTES AND PROCEDURAL RULES

28 U.S.C. § 1257

28 U.S.C. § 1291

28 U.S.C. § 1331

28 U.S.C. §§ 1441(a)

28 U.S.C. § 2201

28 U.S.C. § 2202

28 U.S.C. § 2241

28 U.S.C. §§ 2071 – 2077

42 U.S.C. § 1983

42 U.S.C. § 1988

42 U.S.C. § 3001 *et seq.* (§ 101(10).

42 USC § 1320d-2

42 U.S.C. § 3024 *et seq.*

18 U.S.C. § 1961-1968; and

Fed. R. Civ. P. 8(a) and (f)

Fed. R. Civ. P. 15(a)

Fed. R. Civ. P. 17(a), (b) and (c)

Fed. R. Civ. P. 12(b)(6)

Tenth Circuit Rule 40.1(b)

COLORADO STATUTES AND PROCEDURAL RULES

Colorado Revised Statutes §§ 15-14-102(5) and (6)

Colorado Revised Statutes § 15-14-301 *et seq.*

Colorado Rule of Civil Procedure 17 (a) and(c)

Colorado Rule of Civil Procedure 54(b)

OTHER AUTHORITY

"Legal Battles over Parental Guardianship," National Public Radio show Talk of the Nation, August 23, 2006 - transcript

OPINIONS AND ORDERS BELOW

A copy of the published opinion of the Court of Appeals for the Tenth Circuit, *Mann v. Boatright*, 477 F.3d 1140 (10th Cir. Feb.15, 2007), is included in the Appendix to this Petition at Appendix [App.] p. 9. A copy of the memorandum order entered in the United States District Court for the District of Colorado on December 19, 2005, is at App. p. 1. Because portions of the appeal in *Mann v. Boatright* were decided in interlocutory orders issued by a Tenth Circuit motions panel respectively on January 20, 2006, February 6, 2006, March 7, 2006 and March 30, 2006. Copies of the first three orders are at App. pp. 30, 35 and 40. The last one has been misplaced; a copy of the PACER docket entry for it, summarizing the order in detail, is at App. p. 44. (The district court far more accurately summarized the case than did the Tenth Circuit in its opinion and orders.)

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review the decisions of the Court of Appeals for the Tenth Circuit in this matter. Petitioners timely filed a petition for rehearing *en banc*, which was denied on March 21, 2007 [App. p. 28], and then a successful application for an extension of time, to and including August 17, 2007, in which to file this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it."

Article III, Section 1, provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, provides in relevant part: "The judi-

cial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...."

The First Amendment provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

The Fifth Amendment provides in relevant part: "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; ...."

The Fourteenth Amendment provides in Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL AND STATE STATUTES INVOLVED

The following federal statutes and Federal Rules of Civil Procedure are at issue: 28 U.S.C. § 1331; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 28 U.S.C. § 2241: 28 U.S.C. §1291; 28 U.S.C. §§ 2071 – 2077; 42 U.S.C. § 1983; Fed. R. Civ. P. 8(a) and (f); Fed. R. Civ. P. 15(a); Fed. R. Civ. P. 17(a)(b) and (c); Tenth Circuit Rule 40.1(b). (Others are cited incidentally and are referenced in the Table of Contents but are not relied upon.) The following Colorado statutes and procedural rules are at issue: Colorado Revised Statutes (C.R.S.) §§ 15-14-102(5) and (6): 15-14-301 *et seq.*; and Colorado Rule of Civil

Procedure (C.R.C.P. 17 (a) and(c); C.R.C.P. 54(b). The texts of the statutes and constitutional provisions are at App. p. 45.

STATEMENT

A. Background – The State-Court Litigation

Petitioner Joseph Mann, a retired Chicago journalist now age 90, was a lifelong resident of Chicago until at the insistence of his granddaughter, Gayle King, he traveled to her home in Golden, Colorado in October 2004 and was never allowed to leave that state. In June 2004, he was diagnosed by his longtime Illinois physician with early-stage Alzheimer's disease, but his only serious ongoing mental impairment then and still is severe loss of short-term memory capacity. Yet through a series of police orders and court orders obtained by King, none of them obtained through the presentation of medical records or medical testimony—none was ever offered in any legal proceeding—and all of them issued *in absentia* and while physically and then by express court order denied access to private counsel, he has since then been forcibly sequestered *in communicato* in a series of nursing homes and assisted living homes in metropolitan Denver, having been declared completely mentally incapacitated and rendered the unlimited ward of King. Joseph, a widower, has three children, one of them petitioner Beverly Mann, none of whom lives in or near Colorado. Other than King's now-eight-year-old daughter, he has no other family member in Colorado.

The rulings were made orally on April 19, 2005 at the close of the perfunctory hearing and were entered in written form on May 11, 2005, made *nunc pro tunc* to April 19. The probate case is titled *In the Matter of Joseph Mann*, No. 04-p-1176. She was given the authority to determine what information he receives, including the very fact of the court proceedings, the court orders, their effects and how they came about.

On July 22, 1998, Joseph had executed a durable heath care power of attorney that named Beverly his attorney in fact and the same day executed a will that named Beverly the executor

of his estate. King was the fourth-named preference in each of these documents. The documents were drafted and notarized by his Chicago attorney and signed in that attorney's office. The originals of those documents remain in that attorney's office. Three days after he arrived at King's home in October 2004, he fell down a flight of stairs at the home, shattering his left elbow and sustaining a concussion. He was hospitalized initially for nine days, undergoing two surgeries on his elbow and re-hospitalized two weeks after his initial release, for elbow-joint-replacement surgery. King placed him at a small privately-owned nursing home in Lakewood, where he remained during the period between those hospitalizations and until December 23, 2004.

Throughout the period between October 23 and approximately November 20, a few days after his final surgery, he was, by all accounts, severely delusional and completely mentally incapacitated due to pain and narcotic pain medication. On November 4, three days after Joseph's release from the hospital and one day after Beverly told King of her plans to travel to Colorado the next day to see Joseph, King, at the suggestion of the nursing home's administrator, took Joseph to the law office of Wheat Ridge, Colorado attorney Stephenie D. Lorimer, who drafted, obtained Joseph's signature on, and notarized two power of attorney documents that named King the attorney in fact. One was a health care power of attorney that stated a preference for King as Joseph's guardian should he ever need one and that purported to supersede the one executed on July 22, 1998. The other was a financial matters power of attorney. Joseph's funds were used to pay Lorimer's fees. Lorimer notarized the documents.

By November 28, 2004, the last time that he and Beverly saw each other, he was, as his nursing home records would verify, fully recovered mentally from the effects of the accident and medication. In a conversation in his nursing home room that evening, overheard by a nursing home employee, Joseph told Beverly he wished to return to Chicago. She agreed to assist him in doing so. The bizarre series of events that transpired during the next few days are detailed in

a letter that Beverly wrote to the Lakewood, Colorado City attorney on May 24, 2005 pursuant to Colorado's governmental immunity statute. The letter is at App. p. 93.

On December 2, 2004, less than one month after drafting and obtaining Joseph's signature on those power of attorney documents, but now acting openly as King's rather than Joseph's attorney, Lorimer filed the petitions for guardianship and conservatorship. A copy of the November 4, 2004 health care power of attorney was attached as an exhibit, and the petitions highlighted that Joseph had stated a preference for King as his guardian should he need one. In January 2004, Beverly filed formal objections to the guardianship and conservatorship petitions pursuant to the pertinent section of the Uniform Guardianship and Protective Proceedings Act, C.R.S. § 15-14-102 *et seq.*

On February 10, 2005, Golden, Colorado police chief William Kilpatrick, acting as conduit for King and for the administrator of Golden Pond, met privately in-chambers with Zimmerman and arranged for King to appear in chambers but off-the-record the next morning and hand Zimmerman a draft order for him to sign appointing King Joseph's unlimited guardian through the date of the hearing, scheduled for April 15, on King's petitions for permanent guardianship and conservatorship. King appeared in chambers the next morning and the judge signed the order she handed him. There was no hearing and no record of any of this other than the signed order itself. A letter that Beverly wrote to the Golden city attorney dated June 30, 2005 pursuant to Colorado's governmental immunity statute describes Kilpatrick's motive: to give retroactive cover to actions of a Golden police officer, Matt Jurischk, whose conduct also is detailed in the letter. The letter is at App. p. 102. (The assisted-living home administrator was discharged from her job in August 2005, apparently because of the role she played in these events).

C.R.S. § 15-14-312 requires that emergency-guardianship wards be represented by counsel so that the ward can request a hearing and contest the emergency guardianship, so later that day Zimmerman phoned attorney David R. Gloss, a "regular"

there whose court appointments alternate indistinguishably between attorney and guardian *ad litem*, and discussed the case with him and appointed him Joseph's attorney.

Gloss's purpose, he himself made clear from the outset, however, was to run interference on behalf of King, keeping Joseph from retaining private counsel and from contesting the emergency guardianship and King's pending petitions. In a phone conversation with Beverly on February 14, Kilpatrick told Beverly of his meeting and arrangement with Zimmerman, the emergency guardianship appointment and Gloss's appointment. Beverly filed a motion for recusal of Zimmerman, based upon a supporting affidavit she drafted describing in detail what Kilpatrick told her. On April 12, 2005, three days before the date for the "permanent orders" hearing on King's petitions, Zimmerman granted the recusal motion, and the case was reassigned to Judge Brian D. Boatright, who rescheduled the hearing for April 19. In separate phone conversations Beverly had with the respective law clerks and secretaries of the two judges on April 12 and 13, each of these four people said that the two judges discussed the case at length during those to days.

Colorado law recognizes the distinction between the respective roles of counsel for the respondent or ward and guardian *ad litem*. See *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo. App. 1998). Yet neither Gloss nor any of the four successive probate judges assigned to the case, has ever even pretended that Gloss's role is to act in the traditional role of attorney on behalf of Joseph. Gloss has unabashedly represented King, filing on behalf of her, motions, responses to motions and objections whose overt purpose is to undermine what Gloss does not deny are Joseph's wishes, always falsifying in the documents that they are filed for *Joseph* by his attorney. In his first conversation with Beverly, on February 14, 2005, he said *he* would make recommendations to the judge depending upon "which one I like better"—King or Beverly. Given the circumstances of his appointment, of course, and the percentage of his income that comes from such appointments, it was not much of a contest. It was Gloss.

not Lorimer, who at King's behest presented the motion to bar Joseph from attending his own competency hearing.[1]

King conceded at the hearing that her reason for wanting Joseph not to attend was that it would upset him to learn of her petitions (and, presumably, would contest them). Gloss, also curiously, stated that he had informed Joseph of the legal proceeding and had told him that its purpose was to enable King to make medical decisions for him while he was in Colorado if he could not make those decisions himself. Gloss said he had obtained Joseph's authorization for this. On the afternoon of the hearing, a warm sunny spring day, Joseph was ensconced at Golden Pond, a five-minute drive from the courthouse, and perfectly able to voice his wishes.

In mid March 2005, Beverly had filed a motion for intervenor, which was granted in a written order issued moments before the April 19 hearing began. Also in that written order, however, long-pending pre-hearing motions that Beverly had filed seeking for access to her father's medical and financial records, to his physicians and to other medical personal, to her father himself and to subpoena authority were denied. The judge's stated that King, as emergency guardian, had the sole authority to permit access to those records and witnesses; King, the judge said, was required to produce to Beverly only those records, and allow Beverly access only to those witnesses, that King herself planned to present at the hearing in support of her petitions. A motion that Beverly had filed for *in camera* inspection of the records also was denied in the same order, upon the same stated basis. (Another

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[1] *Estate of Milstein* acknowledges the constitutional implications of the right to counsel in the tradition sense and the right to be present at one's own competency hearing, and the reason for and importance of that right. The Colorado Office of Attorney Regulation Counsel nonetheless expressly approved Gloss's conduct when Beverly filed a complaint with that agency. That same agency expressly approved Lorimer's conduct, as well, including her drafting of, and obtaining of Joseph's signature on, the power of attorney documents on November 4, 2004 and a month later filing the petitions for guardianship and conservatorship as King's attorney—all paid for using Joseph's money.

motion Beverly had filed for leave to depose her father had been ignored.) When Beverly had attempted to have subpoenas processed by the probate clerk, the clerk refused, saying she was instructed to not process them. The judge's law clerk then confirmed this.

The only witnesses King presented at the hearing were herself and Joan Scheumann, one of King's aunts and the youngest of Joseph's three children. Beverly's right to cross examination was limited to four minutes, total. (In a motion Beverly filed two months after the hearing, she raised the issue of a set of antique Japanese artwork worth several thousand dollars that had hung on a wall in Joseph's and his wife's home for several decades. King claimed that on December 3, 2004, one day after King, with the support of Schumann, filed the petitions for unlimited guardianship and conservatorship claiming that Joseph is so mentally incapac-itated that he cannot make even basic decisions for himself, Joseph gave the artwork to Scheumann, telling her he wanted her to have it because it would remind her of her mother.)

Of necessity, Beverly's only witness was herself. She was given a total of a timed-by-hourglass one hour, including opening statement, direct testimony and cross examination, to contest the petition at the hearing. Aware of C.R.S. § 15-14-310, titled "Who may be guardian - priorities - prohibition of dual roles," which in its prescribed order of priority lists respectively as second and third priority "[a] person nominated as guardian by the respondent, including the respondent's specific nomination of a guardian made in a durable power of attorney" and "[a]n agent appointed by the respondent under a medical durable power of attorney pursuant to section 15-14-506," Beverly spent most of her allotted hour relating the events of October and November 2004 and proving that on November 4, 2004, Joseph was by all accounts delusional and completely mentally incapacitated and that by November 28 he had regained his pre-accident mental capacity. Section 310(2) provides that a respondent's nomination or appointment of a guardian creates priority for the nominee or appointee "only if, at the time of nomination or appointment, the

respondent had sufficient capacity to express a preference." (See § 310(1)(b) and (c) at App. pp. 64-65.)

Beverly's testimony, both regarding her father's mental state on November 4, 2004 and regarding his mental state and the substance of her conversation with him on November 28, 2004, was uncontested.

At the close of the hearing, the judge began his recitation of what he called his "findings" with a statement that Joseph indeed was delusional and completely mentally incapacitated when on November 4, 2004 King and Lorimer obtained his signature on the two power of attorney documents. The judge made clear that he believed that King and Lorimer knew that Joseph lacked the mental incapacity to execute legal documents. That was the single substantive ruling in Beverly's favor in the entire now-nearly-three-year-long probate matter. He then declared Joseph completely mentally incapacitated, citing only two facts: Joseph's mental state in early November 2004 (he cited specifics of the evidence of Joseph's mental incapacity in early November 2004) and that Beverly had conceded that her father had been diagnosed with Alzheimer's disease. Saying that "[h]owever [Joseph] came to be in Colorado, he's here now" and is settled in a comfortable assisted living home, and since King is his only adult relative in Colorado, she is appointed his guardian and conservator.

Then, *sua sponte* and without even an iota of prior notice, he granted King absolute, utterly unbridled and unmonitored authority over every aspect of Joseph's life. He handed her the authority to determine whom Joseph sees or communicates with by phone or mail, and to sensor and monitor all his communications. With the court's approval, she has forcibly severed his relationship with virtually everyone with whom he had remained close—not just Beverly but also cousins, longtime friends, former colleagues. She was given the authority to determine what information he receives, including the very fact of the court proceedings, the court orders, their effects and how they came about. She has used that authority to bar everyone, including his Colorado physician and the metropolitan Denver Older Americans Act ombudsman, from

telling him of the court proceedings and court orders, their purpose, their effect and how they came about. The probate court is aware of this.

The single exception to King's total authority over Joseph's contacts is that Beverly is entitled to communicate with him by mail of video message, but *only* by those two means, and only provided that she sends them care of King so that King can censor them. The court order explicitly prohibits Beverly from "disparaging" King in those communications. Joseph was placed under the *in communicato* house arrest of his granddaughter. The judge said he would consider modify-ing this part of the order sometime down the road so that Beverly could visit her father if monitored by King.

The judge added all these restrictions, off-the-cuff, when as the hearing closed, Beverly said she wished to visit her father that evening before she returned home to Michigan the next day. The judge said that because King is Joseph's guardian, she is *per se* entitled to control every aspect of his life. In other words: Joseph is in Colorado; King is his only adult relative there; *ergo*, Joseph should be forcibly estranged from his daughter, his cousins, his friends, and completely sequestered from the outside world in order to ensure that he never learns the reason for his estrangement.

In May 2005, the judge authorized King to distribute as she wished or have destroyed all of Joseph's personal possessions, including many-decades-old photographs, mementos and heirlooms, without consulting Joseph or the provisions of his will. (The will, as King conceded in a court document, appoints Beverly the executor. It was executed at his Chicago attorney's office on July 22, 1998 along with the durable health care power of attorney. The original remains in his attorney's office.) Suffice it to say that King did so.

In June 2005, the probate court effectively removed all court oversight over King's use of Joseph's financial assets and later expressly allowed her to surrender an annuity and his life insurance policies. There remains no oversight of King's use of the money (although several thousand dollars is used each month to pay the costs at the Colorado Veterans

Administration home where Joseph now lives). Beverly estimates that Lorimer has now been paid approximately $50,000 from Joseph's funds to represent King in the guardianship matter and also herself and King in a pending lawsuit discussed below at pp. 21-23 that Beverly filed on her father's and her own behalf.[2]

In June 2005, Beverly filed a motion under Colorado Rule of Civil Procedure 54(b), which is similar to Fed. R. Civ. P. 54(b), asking that the orders be made final and appealable. The judge denied the orders, saying that the orders were by their nature final and appealable. The Colorado Supreme Court and Court of Appeals beg to differ; see *Scott v. Scott*, 136 P.3d 892 (Colo. Jun. 5, 2006), and *Scott v. Holt*, 2006 Colo. App. LEXIS 1920 (2006). See also C.R.S. § 15-14-317. In August 2006, after the issuance of *Scott v. Scott*, Beverly filed another such motion. The motion remains pending, obviously indefinitely.

Also in June 2005, Beverly filed a motion asking that the judge memorialize in writing his oral finding that King and Lorimer had obtained Joseph's signature on the two power of attorney documents on November 4, 2004 at a time when he

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[2] There apparently was an *ex parte* order entered recently in the probate case requiring Beverly to reimburse the State of Colorado for Gloss's fees. Beverly learned of this on October 1, 2007 when she received a bill in the mail for more than $2,000 from the State's "Court Recovery" office. Beverly brought this to the attention of the federal court it the new litigation, and in response on October 5 Gloss filed a document stating that Beverly indeed has been ordered to reimburse the State for all Gloss's fees fro the date of the order. She suspects that Gloss is being paid by the State for his time in litigating on his own behalf the lawsuit discussed below at pp. 21-23 and that Beverly has been ordered to reimburse the State for those fees; since she is not receiving copies of Gloss's invoices, she does not know what, exactly, she is being charged for. Nor, having received no notice of a motion for such an order, does she know how this order came about. Gloss's October 5 filing does explicitly acknowledge that he has sought and obtained court orders that undermine Joseph's wishes, and indeed that document itself does so; it asks that that lawsuit, filed on behalf of Joseph and now seeking emergency equitable relief for him of exactly the sort that he has requested, be dismissed as *res judicata*.

lacked the mental capacity to execute legal documents. The motion was denied; the judge said that his statement at the close of the April 19, 2005 hearing was not a legal finding because the validity of the competing powers of attorney was not an issue at the hearing and that such matters are irrelevant in guardianship. The judge did not acknowledge the existence of § 15-14-310, although Beverly cited it in her motion. Gloss had filed a response in Joseph's name contesting the motion.

Gloss also—his obvious conflict of interest notwithstanding—has, along with King, successfully objected to each of Beverly's three motions for leave to retain private counsel for her father—one filed several weeks before the April 19, 2005 hearing, one filed shortly after the hearing, and one filed in the spring of 2006. In each instance, Gloss states in the opening paragraph that the response or objection is filed by Joseph.

After the third of these motions was denied, Gloss filed a motion, this time on behalf of the State of Colorado but in Joseph's name, asking that Beverly be ordered to reimburse the State—which, curiously, upon Gloss's appointment, was ordered to pay Gloss's fees notwithstanding that Joseph had the financial capacity to retain counsel—for Gloss's time in responding to the motion, which Gloss characterized as frivolous. Gloss's motion was granted. At about the same time, Gloss (ostensibly for Joseph, of course) along with King successfully objected to a motion Beverly filed asking for a hearing at which Joseph's Colorado physician would testify. Beverly's motion detailed a series of phone conversations she had just had with the physician, Gerard Federico, O.D.; he expressed dismay at the breadth of control over Joseph that the court had given King and who agreed with Beverly that Joseph's forced sequestration likely was causing him physiologic harm. Gloss then sent a letter to the physician threatening him with legal action on behalf of Joseph under the Health Insurance Portability and Health Insurance Act (HIPAA) (42 USC § 1320d-2) if the doctor or his colleagues ever again spoke with Beverly; forbidding him from discussing the legal matter with Joseph; and instructing them not to disclose the author of the letter.

Beverly notified the probate court of this. The probate judge's response was to grant Gloss's motion to require Beverly to reimburse the State of Colorado for Gloss's attorney's fees in responding to the motion for leave to retain private counsel for Joseph.

Gloss also (in Joseph's name) opposed the appointment of a guardian *ad litem* in the summer of 2006. It was the single dichotomy that had developed between King and Gloss; King and Lorimer, apparently at the time fearing that the Tenth Circuit would reinstate this lawsuit, supported the appointment of a guardian *ad litem*, stating that it would be best to have someone new review the case. When the guardian *ad litem* reported Joseph's desire to have contact with Beverly, and filed a rather timid motion offering to monitor phone conversations between Beverly and her father, Gloss filed a motion in Joseph's name objecting to the motion. The motion was denied without explanation; the judge simply stamped it "Denied." In the guardian *ad litem*'s first of three reports, in September 2006, she said a nurse at the assisted living home told her that Joseph would angrily remove the family photos hanging on the wall of his room and declare that he was "returning to Chicago." King then moved him from there to a nursing home.

In early November 2006, shortly after King moved Joseph from the assisted living home to a nursing home, Beverly spoke with her father in two phone conversations a week apart. In the first of the conversations she told her father of the court proceedings and court orders and of why she and he had had no contact for nearly two years. She asked him whether he wanted her to retain counsel for so that he could try to have the court orders vacated. He said, "Yes. Yes. Do that." In the second conversation, on a Friday, she asked him whether he remembered the earlier conversation. He said he remembered talking with her. She then refreshed his memory about the conversation and told him that she had retained an attorney and that the attorney would be setting up a conference call for the three of them on Monday. An employee of the nursing home heard Joseph's part of both conversations. On Monday,

a nursing home employee said King had ordered the call barred, and refused to allow the conference call. Beverly submitted a summary of the three conversations to the probate court along with yet another motion for leave to retain counsel for Joseph. Gloss, mimicking the Mad Hatter, filed an *ex parte* motion *in Joseph's name* requesting the issuance of a contempt citation against Beverly.

In April 2007, after Beverly retained Michigan attorney Michael R. Dezsi, counsel of record in this Petition, to represent her father and her in this Court, she submitted a motion asking that Mr. Dezsi be allowed to visit Joseph during an already-scheduled business trip to Denver. King filed an objection to the motion and also moved to bar any attorney or anyone else sent by Beverly from seeing or contacting Joseph. Gloss, in Joseph's name, joined the objection. Beverly's motion was returned to her unfiled. King's and Gloss's motion was stamped "Granted."

With the exception of the two surreptitious phone conversations in November 2006, Beverly and her father have had no contact with each other since November 28, 2004.

B. The Federal Court Litigation

Denied access to appellate review for herself and for her father, and after filing unsuccessful motions (again) requesting leave to retain counsel for her father—she had filed the first such motion several weeks before the April 19 hearing and a second one shortly after the hearing, citing Gloss's unabashed collusion with King to keep Joseph from attending the April 19 hearing and from contesting the petitions, and his repeated objections (ostensibly on behalf of Joseph) to the motions to retain private counsel for him and for a court hearing at which his presence was required—Beverly filed a lawsuit in the United States District Court for the District of Colorado on her father's and, separately, on her own behalf.

The relief sought included emergency and permanent equitable relief in the form of a hearing at which Joseph's presence was required and at which he would be told of the

court orders and asked whether he wished to seek revocation or revision of them and private counsel to assist him. The complaint also sought monetary damages against some of the defendants. Most of the events for which monetary relief was sought in the federal lawsuit, and some of the grounds upon which declaratory relief was sought, did not relate to anything that was (or is) at issue in the probate matter, and concerned defendants who played no role in the probate matter.

The claims that related directly to the probate orders sought declaratory judgments regarding the constitutionality under the Fourteenth and First Amendments of the substance of the orders themselves and of the procedure by which they were issued. They claimed that both the procedures and the court orders violated a slew of provisions of express Colorado law, which clearly attempts with specificity to protect the constitutional rights, autonomy and dignity of adult guardianship and conservatorship respondents and wards and of "interested persons" such as their children, but that if Colorado law actually does authorize the procedural and substantive actions of the probate court, then that Colorado law itself is unconstitutional. The complaint sought emergency equitable relief for Joseph under 28 U.S.C. § 2241 and 42 U.S.C. § 1983 and equitable relief for Beverly under the latter statute. The complaint referred to Joseph's confinement as an *in communicato* house arrest.

The lengthy complaint was filed *pro se* on November 29, 2005 and detailed the bizarre circumstances described above. It was so detailed because Beverly planned to use it as the foundation upon which to file a motion for immediate equitable relief by which her father's appearance at an actual court hearing would be compelled and at which he would be told of the probate court proceedings and orders, their breadth and effect and of how they came about, and asked whether he wished to challenge the orders and to retain private counsel to represent him. Two weeks after the complaint was filed, she did file a motion requesting that equitable relief.

On December 19, the district judge, acting *sua sponte* issued an order dismissing the entire lawsuit for lack of

subject-matter jurisdiction under his interpretation of the *Rooker-Feldman* doctrine. (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).) He issued a separate order denying the motion for emergency equitable relief as moot in light of the dismissal of the entire lawsuit. He also issued a Rule 54(b) judgment order. Only one set of defendants—the City of Lakewood defendants—had filed an appearance in the case and no defendant had filed a responsive pleading. Later that same day, Beverly filed a *pro se* notice of appeal that identified her father and, separately, herself as the appellants. Not all of the defendants participated in the appeal. The only ones that filed appearances and briefs with the Tenth Circuit are those identified above.

On January 6, 2006 Beverly filed a motion with the court of appeals on behalf of her father and herself requesting the same emergency equitable relief that she had requested from the district court. The motion sought a temporary restraining order or alternatively an emergency motion for writ of mandamus to the federal district court. It also sought to compel the immediate deposition of Joseph Mann. The motion did not specify the jurisdictional statute or procedural rule under which the motion was brought, although it quoted the "Jurisdiction" section of the complaint, including the reference to the All Writs Act, 28 U.S.C. § 1651. No response was filed, but on January 20, 2006, a three-judge motions panel denied the motion, stating in part [see App. p. 30]:

> Ms. Mann seeks a temporary restraining order from this court suspending the continued enforcement of a state court order in Joseph Mann's adult-guardianship proceeding. Under the Younger abstention doctrine, a federal court may not interfere with a state court proceeding when a state forum provides an adequate avenue for relief. [Citation omitted.] ... Ms. Mann has not offered any legal basis for this court to interfere with a pending state action.
>
> Ms. Mann also seeks a writ of mandamus, either to the federal district court or to the state court, requiring a forthwith hearing at which Joseph Mann's presence is

required to apprise him of the state-court proceeding and of its results and consequences. ... [T]here is no basis for ordering the federal district court to hold a hearing in a case that has been dismissed.

On January 26 Beverly moved for an emergency writ of habeas corpus and for reconsideration of the applicability of the *Younger* Abstention Doctrine." The next day she filed a companion motion to compel service of motions upon Joseph *and for leave to retain separate counsel for him.* She also moved to receive prior notice of and opportunity to address issues raised *sua sponte*. The motions illustrated that the exigencies of the situation—Joseph's very advanced age and his virtually total sequestration; the unavailability of appeal either by Beverly or by Joseph, and the categorical denial to Joseph of access to court and to private counsel; and the probate court's refusal for by then three months to rule on two motions Beverly had filed detailing and seeking immediate relief on the basis of a lengthy visit by the metropolitan Denver Older Americans Act ombudsman on October 14, 2005, and a detailed recounting of the ombudsman's conversation with Joseph and Kings refusal to authorize her (the ombudsman) from notifying Joseph of the court orders and asking whether he wished them revoked.

No defendant responded, but on February 6, 2006, the motions panel issued an order [App. p. 35] angrily denying all parts of the motions. The order did not reaffirm the panel's earlier grounds for denial of the emergency equitable relief. Instead it angrily denied the request for prior notice of *sua sponte* grounds for and opportunity to address those grounds before the issuance of the ruling invoking them; pronouncing the request frivolous, the panel stated that courts of appeals regularly decide appeals by invoking *sua sponte* grounds without prior notice and opportunity to address the grounds, and said the court would request briefing on its *sua sponte* grounds only if and when it wished to have the issues briefed.

Invoking new *sua sponte* grounds that included a misstatement of fact, a misstatement of Colorado law, and a

bizarre extension of a Tenth Circuit precedent, *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986), the notions panel denied the emergency relief and also spontaneously pronounced Joseph not a party to the appeal *at all* because Beverly had filed the lawsuit and the appeal *pro se*. *Meeker* concerned a lawsuit filed by the mother of a minor on behalf of her daughter, seeking monetary damages for an already-completed civil rights violation. *Meeker* states as the sole basis for what it admitted was purely a policy choice on the part of the court that when the minor reached the age of majority she might wish to have her case litigated by counsel.

The motions panel did not acknowledge that Beverly was seeking leave from that court to retain private counsel for Joseph. The panel did, however, threaten to fine her $500, payable to the court, under Tenth Cir. R. 40.1(B), by which the court gives itself the authority to order such fines, apparently on whim, in order to control its docket—even for the filing of motions that constitute the first opportunity to address the court's *sua sponte* grounds for its spontaneous resolution of the appeal *vis-à-vis* one of the appellants.

Beverly filed a motion for *en banc* rehearing regarding the extension of *Meeker* to a case seeking emergency equitable relief on behalf of an ill elderly man who by operation of government action is otherwise denied access to court and to counsel. The motion also questioned the authority of a motions panel to spontaneously pronounce a party to the district court proceeding whose name appears on the notice of appeal not a party to the appeal, and to remove his name from the caption of the appeal. The motions panel barred distribution of the motion to the *en banc* court, issued a show-cause order to Beverly, and then ordered her to pay a $500 fine to the court. Fearing waiver of her father's right to petition this Court for a writ of certiorari or of her own right to do so on his behalf, Beverly continued to include her father's name in the caption in her filings. The appellants' briefs sought revocation of the motions panel's orders as well as reversal of the district court's judgment.

The published opinion of the merits panel issued on Febru-

ary 27, 2007 appears geared primarily to rationalize the actions of the motions panel, and secondarily to authorize federal district judges to *sua sponte* dismiss *pro se* lawsuits—not merely the complaints, with leave to file an amended one, but the entire lawsuits. Written by the same judge that wrote the opinion at which the per curiam Court recently expressed dismay in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), this opinion veritably spews vitriol not only at Beverly but at *pro se* plaintiffs generically.

In affirming the motions panel's extension of *Meeker* to this case and affirming its pronouncement that Joseph was not a party to the appeal and spontaneously removing his name from the caption, the court did not merely restate the grounds stated in *Meeker*; it gave quick lip service to that ground but made clear that the primary ground was the one offered to this Court in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), by the respondents in that case, a case that although not yet decided by this Court, Beverly had discussed extensively in the appellants' briefs: that the policy preference of Congress in enacting 28 U.S.C. § 1654 notwithstanding, *pro se* litigation should be prohibited to the fullest extent possible given § 1654 because all litigation should be prescreened by an attorney in order to lower the risk of frivolous litigation or frivolous interlocutory motions, and cited Beverly's appellate motions as examples.

The court, unlike the motions panel, did acknowledge that under Colorado law Beverly was entitled to serve as her father's *ex rel.* but stated without explanation—and surely erroneously—that under Colorado law she must do so through counsel. Like the motions panel, the court did not mention that she had asked the court for leave to do exactly that. In a particularly odd, circular and seriously dangerous statement, the court offered as separate justification that in requesting the equitable relief she requested for her father she had "admitted" (early on) that she did not know what whether her father wished the lawsuit on his behalf to proceed. The court did not mention that having been denied access to her for father for (at the time the lawsuit was filed) a year, and recognizing that her

father did not know of the probate proceedings and in any event had no way to communicate and to gain access to court on his own, the equitable relief she sought was precisely that he be informed and asked his preference.

Nor did the court note that Beverly had moved *that* court, alternative to a hearing at which Joseph's presence was required, for leave to depose him, and that that motion was denied on the basis that the district court had dismissed the lawsuit. Tautologies have been a hallmark of the rulings in this litigation, but this is a particularly dangerous one. It effectively grants governments within that circuit the authority to hold United States citizens in permanent *in communicato* captivity without access to court via an *ex rel.* because the captive has not communicated a desire to have access to counsel and to court.

Having removed all claims brought on Joseph's behalf from consideration in the appeal, the court—misstating the holding of *Scott v. Scott*, *supra*, and interpreting *Exxon Mobil Corp.*, 544 U.S. 280 (2005), and *Feldman* itself as requiring no analysis beyond determining whether the related state-court proceeding had concluded—held that most but not all of the claims in the lawsuit were barred under the doctrine. The court however did not specify which claims it was holding were, and therefore which were not, so barred. Instead, it simply affirmed the dismissal of the entire lawsuit—not the complaint, with remand in order to allow an amended complaint—on what it said were *sua sponte* alternative grounds: the failure of the complaint to comply with Fed. R. Civ. P. 8(a)(2)'s requirement that the complaint be "a short and plain statement of the claim showing that the pleader is entitled to relief." The opinion also claims that Rule 8(a)(2) requires two common pleading techniques that clearly it does not: the identification of legal *theories* and the separation of the claims against the separate defendants into separate counts. The opinion does not mention Rule 15(a) or Rule 8(f).

The court did not hold that the dismissal was with prejudice. Yet because the court did not remand the case but instead simply affirmed the judgment dismissing the lawsuit,

the opinion clearly invites district judges to spontaneously dismiss *lawsuits*—particularly *pro se* lawsuits—upon the judge's determination that the complaint fails to comply with some aspect of Rule 8(a). (See discussion below concerning how this is operating in practice in the District of Colorado.) The court also affirmed the imposition of the $500 sanction. Beverly had argued (among other things) that Cir. R. 40.1(B) exceeds that court's authority under the Rules Enabling Act, 28 U.S.C. §§ 2071 – 2077. The opinion does not address that claim nor does it invoke that Circuit Rule. Instead, it claims for the court the inherent authority to issue such sanctions in order to manage its own time and docket; the opinion does not cite to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), because the court was not limiting the authority it claims for itself to the narrow parameters of *Chambers*. Beverly timely filed an unsuccessful petition for rehearing *en banc* and then a successful application to Justice Breyer for an extension of time in which to file this petition.

REASONS WHY THE WRIT SHOULD BE GRANTED

Although it would appear from the above that there no longer is federal litigation concerning these events pending in the lower federal courts, that appearance is inaccurate. On November 29, 2006, exactly a year after she initiated this litigation, Beverly filed a similar lawsuit seeking the same relief in Denver District Court. She then moved immediately and successfully for a stay of that lawsuit until the appeal in this one was resolved, saying that she would dismiss that case if this one was reinstated by the court of appeals. On May 3, she began to serve the defendants with the summons and complaint in that case. On May 17, the City of Lakewood defendants, removed the lawsuit to federal district court. The notice of removal cited 28 U.S.C. §§ 1441(a) and 1331, and stated that counsel had conferred with each of the defendants or a representative and that they all concurred in the decision to remove the case. The lawsuit, captioned *Joseph Mann, et al. v. State of Colorado, et al.*, No. 07-1044, is assigned to a

different judge and magistrate than this one was.

The defendants promptly filed motions to dismiss citing the Tenth Circuit's opinion in *Mann v. Boatright* holding that under *Rooker-Feldman* the lower federal courts lack jurisdiction to hear the case and that Beverly lacks "standing" to serve *pro se* as Joseph's *ex rel.* (The defendants, with the exception of the State of Colorado, do not acknowledge that the Tenth Circuit held only some of the claims barred by *Rooker-Feldman.*) Their motions also claim that the Tenth Circuit's dismissal of the earlier lawsuit on Fed. R. Civ. P. 8(a) grounds really was a dismissal on the merits under Fed. R. Civ. P. 12(b)(6).

Beverly filed a motion for remand back to Denver District Court. She stated that while she firmly believes that the federal district court has subject matter jurisdiction to hear the case, she is happy to accept the Tenth Circuit's claim that *Rooker-Feldman* removes federal jurisdiction, and to litigate the case in Denver District Court where she filed it. She also said that the lower federal courts either do or they do not have jurisdiction under 28 U.S.C. § 1331 to hear the case, and that the defendants cannot keep the lawsuit out of both federal court *and* state court by claiming first that the federal courts do have jurisdiction and then that they do not. She also noted that the Tenth Circuit has made clear that it does not want the federal courts within the Circuit to hear the dispute.

Regarding the *res judicata* claim based upon the *sua sponte* dismissal of the lawsuit for failure to comply with Rule 8(a)(2), Beverly has noted that the Tenth Circuit held that Joseph was not a party to the earlier lawsuit at all, having been precluded by the court itself from being deemed one; that the Fifth Amendment procedural due process problems with the defendants' *res judicata* assertions are myriad and obvious; that under the Tenth Circuit's own precedents a finding that a procedural or jurisdictional problem does not bar a second lawsuit if the procedural problem (e.g., failure of the initial complaint to comply with Rule 8(a)) is corrected or the jurisdictional problem (ripeness, in that case) no longer is valid (see, e.g., *Lake Resources Ltd. v. United States Dept. of*

Agriculture, 378 F.3d 1132 (10th Cir. 2004)); and that in any event under those same Tenth Circuit precedents prerequisites to issue preclusion are that the issue itself was clearly decided and (more important) that there was a full and fair opportunity to litigate the issue.

The latter, of course, is inherently not met when a court of appeals raises *sua sponte* an issue not litigated in the district court and in the same order or opinion in which it raises the issue also decides the appeal on the basis of that issue, thus denying the losing party prior notice and opportunity to address it. She also filed a motion requesting that if *Rooker-Feldman* again is found to preclude federal jurisdiction in this dispute but not remanded back to state court—which is what the defendants are requesting—the defendants be barred from removing to federal court the new similar lawsuit that Beverly will file on her father's and her own behalf. Otherwise, the motion said, Beverly, her 90-year-old father, and the federal district court will find themselves on a treadmill.

At this writing all of these motions remain pending. This situation surely illustrates the wisdom of the Constitution's framers in according to the Congress, in Art. III, Sec. 1, the *sole* authority to promulgate federal jurisdictional provisions, subject only to the mandates of the Constitution itself. This situation surely also demonstrates the sheer silliness of the Court-created *Rooker-Feldman* doctrine, as well as the profound tangible harm it has inflicted. There is a paramount need for this Court to overrule outright its opinion in *Feldman* as violative of Art. III, sec. 2, and of 28 U.S.C. § 1331, and as violative of the constitutional prerogative of Congress to alone craft federal jurisdictional bars and authority provided that its jurisdictional statutes comport with the dictates of the Constitution. Art. III, Sec. 2 provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority". The wording of 28 U.S.C. § 1331 mirrors nearly verbatim these words in Art. III, sec. 2.

Feldman's premise is that 28 U.S.C. § 1257 implicitly in-

cludes the word "only," and therefore bars the lower federal courts from exercising jurisdiction in cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. It is a premise that is both factually clearly erroneous and as a matter of constitutional and statutory linguistics; presumably, the provision that "The judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" means that the judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

Also presumably, this includes 28 U.S.C. § 2241; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 42 U.S.C. § 1983 and the other federal jurisdictional statutes cited above in this petition, irrespective of which government—or specifically here, which of the three branches of a state's government—is inflicting the injury. The claim that the lower federal courts lack jurisdiction to hear cases that allege (even as here truly brazen and profound) violations of federal constitutional and statutory provisions appears to stem from confusion between a direct appeal and a collateral appeal. There is no more legitimate reason under the Constitution or federal statutes for the courts to not have jurisdiction to hear lawsuits asserting violations of federal constitutional or statutory provisions by state courts than by state legislatures or a state's executive branch. And indeed, the 1996 amendment to 42 U.S.C. § 1983, which inserted into that statute the language that "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable" would appear to expressly confer federal jurisdiction to hear lawsuits alleging the deprivation of federal rights by state judges.

This Court appeared to try to make that point in *Exxon Mobil* in stating that § 1257 does not "stop a district court from exercising subject-matter jurisdiction simply because a

party attempts to litigate in federal court a matter previously litigated in state court [and that if] a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." But because that language is (obviously) so difficult to reconcile with the infinitely-more-oft-quoted language from that opinion that the *Rooker-Feldman* doctrine applies "to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments," the lower courts have mechanically dismissed any lawsuit related to an earlier state-court lawsuit that the federal court finds, accurately or inaccurately, is completed.

The cases cannot be reconciled with the holding in *Marshall v. Marshall*, 126 S. Ct. 1735 (2006), an opinion that, like the seminal but never-quoted language of *Exxon Mobil*, the lower courts simply ignore, nor can they be reconciled with this Court's roundly ignored holding in *Whitman v. Dept. of Transportation*, 126 S. Ct. 2014 (2006), opinions that Beverly brought to the attention of the Tenth Circuit and which the court did not mention. *Whitman* holds that what is at issue in determining federal jurisdiction is not whether particular given statute confers jurisdiction but instead whether *some* statute—28 U. S. C. §1331, in that case and in this one—confers it and no other statute divests it.

No other statute divests it here. To the extent that it *actually* exists, access to federal court is too fundamental a right, the equal protection of such access too important, for it to rest upon common law language that appears to require the lower federal courts to parse how-many-angles-can-dance-on-the-head-of-a-pin language that as practical matter is unparsable. Most federal jurisdictional statutes, and surely the language of Art. III, Sec. 2, are categorical and clear.

Regarding Joseph's right to access to court via Beverly and

Beverly's right to seek equitable relief for him, this Court acknowledged in *Winkelman*, *supra*, that access to federal court by some-one who lacks the legal capacity to sue on his own in order to vindicate a federal equitable right cannot appropriately depend upon his *ex rel.*'s access to counsel. There are constitutional due process, equal protection and right-to-petition reasons for this, all of them inferentially acknowledged in *Winkelman*. The Congress, in enacting 28 U.S.C. § 1654, recognized the right of those who lack access to counsel to nonetheless have access to federal court. This Court in deciding *Winkelman* found it unnecessary to determine whether such a right can be denied to those who by operation of law lack the legal status to sue on their own behalf; the Court, noting the historical recognition in American jurisprudence of the special relation-ship between parents and their children held that some rights repose in both the parent and the child and that the parents of the minor in that case thus may litigate *those* rights *pro se* on their own behalf.

Petitioners here ask that this Court consider whether the rights of Joseph and others in his position are sufficiently profound and affect his wellbeing enough that they repose in Beverly as well. See, by analogy, *Carringer v. Rodgers*, 331 F.3d 844 (11th Cir. 2003); *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961). They ask alternatively that this Court determine here whether the right to access to federal court can be denied to those who by operation of law lack the legal status to sue on their own behalf, because the *ex rel.* lacks access to counsel. They also ask that this Court address whether federal appellate courts possess the authority to spontaneously pronounce a party to the district court case, whose name appears on the notice of appeal, not a party to the appeal and to remove his name from the caption of the appeal—thus perhaps denying him the right to file a petition with this Court for a writ of certiorari.

And they ask that this Court consider here whether federal appellate courts may authorize the federal district judges within its circuit to dismiss *lawsuits* (as opposed to complaints, with leave to file an amended one) for failure of

the initial and only complaint to comply with Rule 8(a)(2), in contravention of Rules 15(a) and 8(f). The Tenth Circuit's ruling appears to conflict with this Court's recent holding in *Jones v. Bock*, 127 S. Ct. 910 (2007), and the authority that that opinion cites. It also appears to violate the Fifth Amendment's due process clause, at least in cases that for statute of limitations reasons or the like cannot be refiled. It also doubles the already substantial filing fees, and there is no guarantee that the same thing will not happen again.

The Tenth Circuit claims virtually unbridled powers to promulgate policy rules under the guise of control of its docket and allocation of the court's limited resources of time. But the obvious appropriate way to reduce the time a court of appeals must allocate to any particular case is to not take *any* action *sua sponte* without first according the parties notice and opportunity to address the issue. It is, moreover, a Fifth Amendment due process right, as this Court formally recognized in *Day v. McDonough*, 126 S. Ct. 1675 (2006); this Court stated that courts are not entitled to take any action *sua sponte* without such due process prerequisites. The Tenth Circuit's cavalier disregard for the nature of the adversarial process and for basic procedural due process itself is stunning, but all the more breathtaking because that court claims the authority to impose a fine for the filing of a motion for reconsideration of the spontaneous resolution of the appeal *vis-à-vis* an appellant and the removal of his name form the caption by a motions panel when the motion for reconsideration was the litigant's sole attempt to address the issue after having been provided notice of it.

There is, finally, the set of substantive issues that comprise the main reason this lawsuit was filed. This Court has never held, perhaps because it may never have been asked to hold, that the basic procedural and substantive due process protections of the Fourteenth Amendment repose in respondents to court petitions that seek a declaration of mental incompetence and the removal of the respondent's most profound rights to liberty and personal autonomy, and that the right of an adult to freely speak and associate with her parent

to the extent that the two of them wish is a substantive constitutional right that the state cannot abridge without compelling grounds and procedural due process. The petitioners ask that this Court grant the writ in order to do so now. They ask that this Court hold that the State's actions abridges and abridge not only their procedural due process rights but, perhaps more important, their First Amendment rights to free speech and free association and their substantive due process rights as defined in the two different contexts respectively in *Daniels v. Williams*, 474 U.S. 327, at 331 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

Last term, in *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), this Court clarified the minimum requirements of a mental competency hearing in the context of a state criminal case. *None* of those requirements was met regarding Joseph, and with but one exception there was never even a nod to the due process protections incorporated into Colorado statute and case law. The one exception was the appointment of sham counsel, whose overt purpose was to appear to meet the statutory requirement of representation by counsel while depriving Joseph of access to counsel and preventing him from contesting the petitions and then the guardianship and conservatorship. *Panetti* also holds that the minimum due process requirements cannot be abridged by the state—whether by state statute, procedural rule, local practice, or the judge himself. The petitioners ask that this Court clarify that such rights accrue as well to such respondents and wards under the Fourteenth Amendment's due process, equal protection and privileges and immunities clauses. But perhaps most important, they ask this Court to clarify that the elderly are not property to be awarded, like money or real estate, to a victorious litigant, and that a diagnosis of dementia cannot constitutionally constitute grounds for pronouncing them such.

It cannot be denied in good faith that these issues are of concern to a broad swath of Americans. Nor, apparently, are instances similar to the one described in this petition uncommon. On August 23, 2006, the National Public Radio show Talk of the Nation dedicated an hour-long show called

"Legal Battles over Parental Guardianship" to the subject, including discussion of kidnappings across state lines to get the parent into the petitioner's state's court system and capricious judicially imposed restrictions upon the respondent's physical mobility, social interactions with family members and friends, and court-ordered conversion of the ward's financial assets and property to the guardian/conservator. A transcript is at App. p. 121.

An *ad hoc* group of Colorado state-court litigants in equitable matters whose experiences, like Joseph's and Beverly's, resembled those of characters in novels by Lewis Carroll or Franz Kafka, communicates regularly via email. Recently a member of this *ad hoc* group emailed several Colorado legislators and requested legislative hear-ings into the issue, with a view toward enactment of corrective legislation and received an email response from Colorado State Rep. Morgan Carroll, vice chair of the House Judiciary Committee. The email response, a copy of which is at App. p. 122, requests a meeting, saying so that the Rep., can get more information before the legislative session begins in January. "I could get more up to speed on what you are already working on see what else we can do on the legislative side of things," she wrote. She also wrote, "**I have previously requested an audit of the probate court – which found some fairly disturbing practices.**"

Recently a friend of Beverly's who was vacationing in Colorado with his family managed to visit Joseph at the Veterans Administration nursing home where he now lives. The friend, who had never met Joseph before, and his wife brought him a box of chocolates and visited with him in his room for about 30 minutes. Joseph repeatedly expressed appreciation for the chocolates and, especially, for the visit. He spoke lovingly of his children, as he had earlier to the Older Americans Act ombudsman and to the guardian *ad litem*. He arose from the bed he was sitting on to point out a picture of his late wife hanging on the wall among other family photos, but said he could not identify in the photos which of his daughters was which. Asked how he spends his time—whether he reads or watches television—he said he

does neither; he said he spends most of his time sleeping. Asked how he likes the nursing home, he said the food is good and the staff treats him very well but said he would not be at that home much longer because he "will be going to Chicago tomorrow." He kept offering his guests chocolates from the box they had brought him.

In recounting the meeting, the friend told Beverly that if there is one word to describe her father it is "Gracious." Indeed he has always been gracious.

After the couple left his room they spoke with a floor nurse, who told them that Joseph "never" has visitors and "never" receives phone calls. During the several months since he arrived there, he had had visitors only once, according to the nurse: a group of seven or eight people who appeared to be observers of some sort; they did not appear to be family or friends. Joseph has many friends and some relatives who long ago stopped trying to reach him. Only Beverly has persisted in trying. Even persons incarcerated after criminal convictions and those held in mental hospitals after traditional civil commitment proceedings normally have relatively free reign over which relatives and friends they can receive as visitors and what those visitors can discuss with them. It should be of concern to this Court that these probate judges claim for themselves such intrusive authority over family relations simply because someone has filed a guardianship petition.

CONCLUSION

This Court should grant the writ in order to resolve the legal issues that this petition presents, because they impact a broad range of fundamental rights of many Americans.

Respectfully submitted,

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